guilty and was discharged under section 173A of the Criminal Procedure Code. When the appeal first came before me, no notice of any kind that an appeal was pending had been served on the respondent. The Public Prosecutor applied under section 314(i) for a notice to be issued; this was done and it has been returned unserved. Section 314(ii) reads :—

"(ii) If the service of such last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence."

The learned Deputy now applies under this sub-section for the appeal to be heard on the merits in the absence of the respondent and suggests that a more severe sentence should be passed and a warrant issued to enforce it. It is admitted that his construction is surprising in that it involves the proposition that a person who has been acquitted in one of the lower Courts might have his acquittal reversed and a conviction substituted and sentence passed and that he might be arrested and imprisoned without having any further opportunity whatsoever to present his side of the case. Such a construction is a plain violation of the fundamental principle *audi alterem partem* and in my view is wholly opposed to all our principles of judicial procedure.

I think the explanation of the section is this. Originally there was no appeal by the Public Prosecutor; the chapter was framed on the view that he would be the respondent and provision is made for the record to be transmitted to him by way of service but without being actually served. Much later, the Code was amended to permit of an appeal on the merits by the Public Prosecutor but section 314 was not amended. I agree that it is a strong thing to construe the word "shall" as "may" but I do not go as far as that. In my opinion, having regard to what I believe to be the history of the section, the true construction is : " 'shall' if the prosecutor is the respondent." I do not think that the word "shall", in a procedural statute, could be construed as strictly as is here contended if the consequence is violation of a fundamental principle; I think that on the true principles of construction of statutes the word "shall" must be given a meaning modified to the extent which I have indicated.

The section might also have application where an appeal was brought by a private prosecutor in a private summons case in which the Public Prosecutor's Department had not taken part. In such a case I think it would be quite proper and reasonable for an appeal by a convicted person to be heard by the Court in the absence of the respondent. I would remark that in the Court of Criminal Appeal in England it is not unusual of an appeal by a prisoner to be heard without any counsel appearing for the prosecution. The position there is slightly different because the Attorney-General does not control prosecutions generally throughout England nor does the Director of Public Prosecutions. Many prosecutions are in charge of County and other local officials who may instruct counsel to prosecute at Quarter Sessions or elsewhere but, having secured a conviction, they may be content to leave the matter of an appeal entirely in the hands of the Court and not incur the trouble and expense of briefing London counsel to represent them there.

There is another ground of principle which I think supports my construction of the sub-section. The Court does not make orders which appear likely to be abortive. Apart from the incongruity of sentencing a man without his having had the opportunity to be heard, it would be futile to pass a sentence without a fair prospect of it ever being enforced.

The Code does not make express provision for the situation which has arisen in the present case but I think that it is within the power of the Court to issue a warrant of arrest in such circumstances, and if counsel for the Public Prosecutor were to apply for a Bench warrant with a view to the apprehension of this respondent, so that the appeal could be heard and an effective order made, then I would consider the application.

The hearing of this appeal cannot proceed but it is not dismissed and may be adjourned to a date to be fixed by the Registrar.

Order accordingly.

S. R. M. RAMAN CHETTIAR v. SOH BEK NEO & ANOR.

[Orig. Civ. Juris. (Abbott, J.) March 5, 1952]

[Malacca — Originating Summons No. 106 of 1949]

Debtor and Creditor (Occupation Period) Ordinance 1948 s. 11(3) — Notice to debtor to reinstate or replace the charge — Meaning of "not less than one month".

The principal question raised in this case was whether the notice given by the plaintiff to the defendant requiring him to reinstate or replace the security was a valid notice under section 11(3) of the Debtor and Creditor (Occupation Period) Ordinance 1948. Section 11(3) of the Ordinance provides that where the rights of a creditor in relation to any charge have been deemed by virtue of sub-section (1) of section 11, not to have been extinguished, the creditor may give notice in writing of not less than one month calling upon the debtor to reinstate or replace the charge. In this case the defendant who was the debtor was required by the notice to reinstate

the charge within one month service of the notice upon him.

Held, the notice did not comply with section 11(3) of the Debtor and Creditor (Occupation Period) Ordinance and that as the notice was invalid the plaintiff was not entitled to claim the relief sought.

Case referred to :—

(1) *The Chartered Bank of India, Australia and China v. Hardial Singh & 3 ors., trading as Gian Singh & Co.* Unreported — K.L. — Originating Summons No. 178 of 1950.

ORIGINATING SUMMONS.

H. B. Ball for the plaintiff.

C. S. Jayaswal for the defendants.

Cur. Adv. Vult.

Abbott, J. : — This case has come before me, by way of re-trial, upon the order of the Court of Appeal. Two matters are in issue, namely, (1) was the notice, as required by section 11(3) of the Debtor and Creditor (Occupation Period) Ordinance, 1948, a valid notice and, if so, (2) was the debt paid by the defendants in pursuance of a demand made by or on behalf of the plaintiff. The first issue is one of law; the second issue one of fact.

As regards the first issue the attention of this Court has been drawn to a decision of Wilson, J., delivered in Kuala Lumpur in *The Chartered Bank of India, Australia and China v. Hardial Singh and 3 others, trading as Gian Singh & Co.*[1] a case which has not, as yet, been reported. The issue raised in that case is identical with that presently raised before me. I cannot, I think, do better than set out *in extenso* the words used by Wilson, J. :—

"Section 11(3) of Ordinance No. 42 of 1948 provides that where the rights of a creditor in relation to any charge have been deemed, by virtue of sub-section (1) of section 11, not to have been extinguished, the creditor may give notice in writing of not less than one month calling upon the debtor to reinstate or replace the charge. In this case the debtors were required by notice dated the 1st day of November, 1949 to reinstate the two charges within one month after service of the notice upon them. It has been argued by Mr. Edgar that the expression 'not less than one month' is the same, or has the same effect, as the expression 'within one month'. I am unable to agree with this contention. He has referred to Stroud's Judicial Dictionary and to Roland Burrows' Words and Phrases Vol. 5 p. 107, but I do not think that the passages quoted support his contention. It seems to me that if a person has to comply with a notice after not less than one month be need not do so until one month has expired or in other words until the day following the expiration of one month. If, on the other hand, he is required to take certain action within one month in order to comply he must act before a month has expired. It follows that I am of the opinion that the notice to the defendants did not comply with section 11(3) of Ordinance No. 42 of 1948, and that the notice was invalid and the plaintiffs were not entitled to proceed by way of this Originating Summons to claim the relief sought. I appreciate the point is entirely technical. but there is nothing in the Ordinance which gives me any right to ignore technicalities.

For this reason I think this action must fail, and there must be judgment for the defendants with costs."

In following the decision of Wilson, J., I am minded to quote the words of Lord Justice Denning — "They (the Judges) insist, however, that it is for the Bar to draw their attention to any precedents which may have any bearing on the matter, so that they may not expound the law differently from their predecessors or their contemporaries". To this I would only, and with humility, add that it would be wrong and against the public interest for a judge sitting at first instance to deliver a judgment in conflict with that of another judge also sitting at first instance except for reasons which could only be regarded as overwhelming. Notwithstanding Mr. Ball's able arguments there are no such overwhelming reasons here. On the contrary, I agree entirely with the decision of Wilson, J., and, for that reason I must give judgment for the defendants with costs.

I cannot, however, leave the case here, I have had to give judgment for the defendants upon a technicality. I have heard evidence and gone into the merits of the case generally upon the second issue — did the defendants pay in consequence of any demand made of them on behalf of the plaintiff by his attorney or by another person? The plaintiff's attorney is now dead and it has been urged that if any such demand had been made the expenses incurred in relation to demands, if made, would have been debited against the defendants in the plaintiff's books of account. No such entries appear. The first defendant and two witnesses gave evidence and I have no hesitation in saying that I do not believe their evidence. They have failed to convince me that there is the slightest probability of truth in their affidavits or testimony, I am satisfied that no such demand was made. I find myself in the unsatisfactory position of having to say that, but for the technicality, I would have given judgment for the plaintiff with costs.

Judgment for the defendants.